Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5032

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EDDIE SPRAGGINS, :

Petitioner, :

-against- :

STATE OF GEORGIA, :

Respondent. :

- - - - - - - - - - - - - - - - -X

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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PRELIMINARY STATEMENT

Pursuant to Rule 24(4) of the Supreme Court Rules, Petitioner, Eddie Spraggins, hereby replies to the Brief for the Respondent in Opposition, filed August 6, 1979. Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari, filed July 6, 1979 ("Petition") avoids certain issues raised in the Petition. Therefore, Petitioner will herein respond to the omissions of the Brief in Opposition so that the real issues underlying this Petition will not be obfuscated.

DISCUSSION

1. The Effect of the Sentencing Judge's Written Charge Was to Preclude the Jury's Consideration of Mitigating Circumstances

A major point made in the Petition was that the substantial disparity between the sentencing judge's oral

and written charges effectively constituted a violation of Petitioner's constituional right to due process of law. See, Petition, at 9-15. Respondent's brief did not even mention this difference, despite the fact that the Georgia statute found constitutional by this Court in Gregg v. Georgia, 428 U.S. 153 (1978), requires an identity of content in the oral and written charges. Ga. Code Ann. §27-2534.1(c).

As was noted in the Petition, the sentencing judge's oral charges informed the jury that mitigating circumstances could be considered and that even if a statutory aggravating circumstance (necessary for the death sentence pursuant Ga. Code Ann. §27-2534.1(b)) existed, a life sentence could be recommended. The inclusion of these instructions in the oral charge vested it with a constitutionality that, in the opinion of this Court and the Georgia Supreme Court, would not have obtained in their absence.* In contrast, the judge's written charge, which the jury members carried into the jury room, failed to instruct the jury both to consider mitigating circumstances and that a life sentence could be

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* See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978) and the five death sentence cases decided by this Court in July, 1976 (Gregg v. Georgia 428 U.S. 153; Profitt v. Florida, 428 U.S. 292; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carloina, 428 U.S. 280; and Roberts v. Louisiana, 428 U.S. 325), which establish the principle that a statutory scheme must allow consideration of mitigating circumstances to be constitutional. See also, Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977) and Hawes v. State, 240 Ga. 327, 240 S.E. 2d 833 (1977), in which decisions the Georgia Supreme Court determined that in order for mitigating circumstances to be effectively considered, the jury must be informed that they can recommend life even if aggravating circumstances were found to exist.

recommended even if they found aggravating circumstances. Petitioner contends that the failure of the written charge to establish the propriety of considering mitigating circumstances effectively undercut the presence of those instructions in the oral charge and thereby denied petitioner his due process right to have mitigating circumstances considered.

Respondent's Brief ignores the distinction between the written and oral charges and makes vague reference to this Court's decision in Capp v. Naughten, 414 U.S. 141 (1973), which in Respondent's words held that "instructions should be viewed as a whole as they will not be judged in artificial isolation." See, Respondent's Brief at 7. Petitioner respectfully submits that in jury charges, where the written word and oral speech clash as was the case here, the respective impact upon the jury is not "artificial".* It is sheer fantasy to suggest that the judge's proper oral charge would retain its vigor in the face of a defective written charge which was on the jury's table while the deliberations progressed. Capp v. Naughten, supra, applies to this case only by its distinguishability. The written charge, constitutionally deficient by all standards, obviously governed the jury's determination; the death sentence should accordingly be overturned.

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* In Capp v. Naughten, the Court ruled that the mere sequence of oral instructions should not be determinative of whether a latter paragraph destroys the significance of a former paragraph.

2. The Vagueness and Overbreadth of the Statutory Aggravating Circumstance Found Present In This Case Encourages Use of Inflammatory Evidence Designed to Elicit Subjective Feelings of Visceral Repulsion Which are Necessarily Capricious and Arbitrary.

The Petition argued that the pernicious combination of the Georgia statute,* which by its seventh aggravating circumstance authorizes the death sentence in almost any case, and the introduction of inflammatory evidence, which that statutory provision invites,** resulted in the capricious, arbitrary and freakish imposition of a death sentence in this case. See, Petition, at 15-23. Respondent's Brief fails to address this point directly.

Instead, Respondent harps on the "facts" of the crime and seems to believe that these facts should outweigh the constitutional requirements which attend to the applicable statute and the trial. Respondent labors under the misapprehension that the "germane issue" in the matter of whether

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* In the case at bar, the sentencing jury found that the seventh aggravating circumstance in the Georgia statutory scheme (Ga. Code Ann. §27-253.4.1(b)(7)) was present:

> "The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim."

The jury did not find that the Petitioner should be sentenced to death "in that his crime encompassed two statutory aggravating circumstances," as the Respondent suggests in its Brief in Opposition, at 12 (emphasis added).

** Respondent's Brief in Opposition admits that inflammatory evidence, such as gruesome photographs of scenes already depicted by testimony is relevant because it "bear[s] directly on the question as to whether the accused's acts fall within one of the statutory aggravating circumstances [i.e., the seventh circumstance, Ga. Code Ann. §27-2534.1(2)(7)]." Respondent's Brief in Opposition at 10.

the seventh aggravating circumstance is sufficiently precise "is whether the Petitioner's sentence to death under the statutory aggravating circumstance is warranted by the evidence" in this particular case. See, Brief in Opposition, at 12. Respondent further states that if the evidence is sufficient in that the facts would offend "anyone's sense of decency" or are "so watonly vile that they almost defy description" (Brief in Opposition, at 13), the Court needn't consider whether the Supreme Court of Georgia has given any definition to the statute's seventh aggravating circumstance.

Petitioner adamantly disagrees. An unconstitutionally vague statute cannot be the instrument of sentencing a man to death. It further cannot gain constitutional dignity because the facts in a particular case may arguably satisfy the most extreme meaning of its broad language. Petitioner contends that the issue is whether the jury knew by what standards it was objectively and impassionately to measure the facts before it. In Georgia, there has been no articulation of such standards, and therefore the Petitioner's death sentence must be overturned.

Further, tne invidiousness of the corollary to the vagueness of this statute, i.e., that it invites inflammatory evidence designed to elicit emotional revulsion, was entirely ignored by Respondent in its Brief in Opposition. Petitioner submits that a statute like Georgia's, which fosters the use of inflammatory evidence, is totally devoid of that vigilence against arbitrariness and capriciousness which was mandated for death sentence statutes by this Court's decision in Gregg v. Georgia, 428 U.S. at 189.

CONCLUSION

For the foregoing reasons, Respondent's Brief in Opposition to the Petition for Writ of Certiorari states no valid grounds for why the Writ schould not issue. Accordingly, Petitioner prays that the Court will issue a Writ of Certiorari to review the judgement and opinion of the Georgia Surpreme Court.

Respectfully submitted,

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Counsel for Petitioner

Of Counsel:

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Howard S. Ockman
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AFFIDAVIT OF SERVICE

SAMUEL J. ABATE, JR., being duly sworn, deposes and says that:

He is over 18 years of age and is employed by the firm of LeBoeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York 10005.

On the 20th day of August, 1979, your deponent caused the foregoing Reply to Brief for the Respondent in Opposition to be served upon the following by depositing true copies thereof enclosed in securely sealed wrappers in a United States mailbox with first class postage fully prepaid thereon, and addressed as set forth below:

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Samuel J. Abate, Jr.
SAMUEL J. ABATE, JR.

Sworn to before me this

20th day of August, 1979.

Maria Havelka
Notary Public

MARIA HAVELKA
Notary Public, State of New York
No. 41-4637976
Qualified in Queens County
Commission Expires March 30, 1980